310(d) of the Communications Act of 1934, as amended,[26] and related Commission rules as a consequence of a transfer of control which occurred prior to Commission consent. An additional question, discussed separately, in Section A, *supra*, is whether Mr. Parker misrepresented facts and/or lacked candor relative to his past broadcast record in connection with various applications, including a transfer of control application submitted by RBI.

Reporting Failures/Premature Transfer of Control

99. At the beginning of the renewal period, RBI was in bankruptcy and held the license for WTVE(TV) as a debtor-in-possession. RBI Ex. 5, p. 1; RBI Ex. 11 (1988 Ownership Report; March 28, 1989 and April 2, 1990 letters from Elizabeth J. Gustafson). RBI's 1988 Ownership Report, which it confirmed as accurate and current in both 1989 and 1990, reflected that RBI had 50,000 shares of stock issued and outstanding, divided among 18 shareholders (or married couples), with Dr. Henry Aurandt and his wife holding the largest stake of 18,000 shares. The 1988 report further reflected that RBI's officers[27] consisted of Dr. Aurandt (president), Dr. Robert Denby (vice president/treasurer), Dr. Sergio Proserpi (vice president) and Jack Linton (secretary). RBI Ex. 11.

100. On August 1, 1989, RBI shareholders met and elected a new slate of directors. The five directors included Dr. Aurandt and Jack Linton as well as Mr. Parker, Dr. Robert Clymer and Dr. Edward Fischer. Adams Ex. 13, pp. 3-4. At the board of

[26] 47 U.S.C. § 310(d).

[27] The report did not identify the entity's directors.

directors meeting, which immediately followed, two officers were elected - Mr. Parker as president[28] and Mr. Linton as secretary. Adams Ex. 14.

101. The shareholders' meeting's minutes also reflect approval of a "Management Services Agreement" ("MSA") between RBI and Partel, Inc., a corporation wholly-owned by Mr. Parker, which had been executed on May 28, 1989. Adams Ex. 13, p. 3; Adams Ex. 19; Tr. 632. The MSA gave Partel full authority to conduct the station's day-to-day business. RBI Ex. 18, p. 2. The MSA further provided that Partel would receive an equity interest in RBI and a certain percentage of its monthly net revenues. *Id.*, p. 3. On September 13, 1989, RBI's directors "ratified" the MSA and directed bankruptcy counsel to submit it to the Bankruptcy Court for approval. Adams Ex. 14, p. 10. Bankruptcy counsel did so on June 19, 1990, and Bankruptcy Court approval followed on August 28, 1990. RBI Ex. 18, p. 5; Tr. 626. RBI did not file the MSA with the Commission or list it on an ownership report until 1997. RBI Ex. 11, *passim*; RBI Ex. 14, p. 1.

102. On January 20, 1991, RBI's plan to emerge from bankruptcy became final and nonappealable. Adams Ex. 20, p. 2; Tr. 786-87. The plan was to become effective on September 17, 1991. *Id.*; Tr. 641, 796-97. In anticipation thereof, RBI, on August 14, 1991, filed a short-form (FCC Form 316) application seeking Commission approval to assign WTVE(TV)'s license from RBI, as debtor-in-possession, to RBI (FCC File No. BTCCT-910814KE). As explained therein, RBI used the Form 316 because, although

[28] Various documents identify Mr. Parker as RBI's executive vice-president. *E.g.*, RBI Ex. 3, p. 1 and Adams Ex. 18, p. 2. Irrespective of what his proper title was, Mr. Parker functioned as RBI's chief operating officer throughout the renewal period. Tr. 824.

new shareholders were to be added and shareholders' interests were going to change in conjunction with RBI's emergence from bankruptcy, RBI's former shareholders would still hold more than 50% of RBI's stock following consummation. Adams Ex. 21; Tr. 789-91. Mr. Parker signed the application as RBI's president, both as transferor and as transferee. Adams Ex. 21. Commission approval occurred on August 27, 1991. Adams Ex. 22; Tr. 791.

103. The shareholder and director information reported in the August 1991 application is consistent with the information that was reported in RBI's 1991 Ownership Report. *Compare* Adams Ex. 21 *with* RBI Ex. 11 (1991 Ownership Report). Among other things, those documents reflect that Mr. Parker was the president and a director of RBI; that RBI's other directors were Dr. Aurandt, Mr. Linton, Dr.Clymer and Dr. Fischer; and that RBI had 50,000 shares of stock issued and outstanding, divided among 18 shareholders (or married couples), with Dr. Aurandt and his wife holding the largest stake of 18,000 shares. As of August 1991, neither Mr. Parker nor Partel owned any shares of RBI stock. Adams Ex. 21; RBI Ex. 11 (1991 Ownership Report). The Form 316 reflected that Partel was slated to receive 118,467 shares (of 399,044 shares to be issued), thereby becoming RBI's largest shareholder. Adams Ex. 21.

104. On September 14, 1991, Dr. Aurandt convened both a shareholders' meeting and a board of directors' meeting for RBI. The meetings occurred as a consequence of Dr. Fischer's resignation from RBI's board of directors. Mr. Parker attended the meetings and disputed their legality. Tr. 668-69, 677, 679, 791-93. Among other things, the meetings purportedly terminated the MSA based on alleged "malfeasance" by Mr.

Parker, removed Mr. Parker as a board member, and replaced him with Mrs. Aurandt.[29] Adams Ex. 13, pp. 39-40, 53, 71-72; Tr. 669-70, 677.

105. Notwithstanding the September 14 meetings, Mr. Parker issued new RBI shares to its former and new shareholders on October 15, 1991.[30] In this regard, Mr. Parker signed certificates that had been prepared by Marvin Mercer, RBI's bankruptcy counsel. Adams Ex. 24; Tr. 797-800, 810. According to Mr. Parker, this action occurred in accordance with the Commission's grant of the short-form application. Tr. 672, 795-97. Indeed, most of the shareholders received the exact amounts reflected in the transfer application. Tr. 802-03.

106. However, in at least two instances, the number of shares issued did not match the number approved by the Commission. In this regard, although the Commission had approved issuance of 118,467 shares to Partel, the number actually issued was 124,401. According to Mr. Parker, the nearly 6,000 extra shares were issued with a warrant to Meridian Bank, which allowed the bank to purchase the shares for $1, in exchange for forgiving a $500,000 payment that RBI had promised to pay. Tr. 800-01. Likewise, although the Commission had approved issuance of 74,678 shares to Dr. Aurandt, RBI actually issued only 23,868 for the benefit of Dr. Aurandt. *Compare* Adams Ex. 21 *with* Adams Ex. 24; Tr. 799, 803. *See also* Adams Ex. 13, pp. 84-86. As for Dr. Aurandt, Mr. Parker explained that RBI chose not to issue the additional shares to

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[29] RBI's records reflect that Dr. Aurandt and Mr. Parker had been at odds for some time and that Dr. Aurandt had previously attempted on more than one occasion to remove Mr. Parker as RBI's president. Adams Ex. 13, p. 52.

[30] RBI stock was reissued to all shareholders on December 31, 1991, at the insistence of Meridian Bank in order to reflect the bank's status as RBI's secured creditor. Tr. 798.

him because of questions arising from a court judgment and garnishment against Dr. Aurandt, matters which Mr. Parker apparently did not know about during the pendency of the Form 316. Adams Ex. 13, pp. 83-84; Tr. 701-02, 803-04, 810. In this regard, Mr. Parker testified that he received the writ of execution relative to the garnishment on or about October 11, 1991. Tr. 888-89, 916. Mr. Parker understood that if the garnishment ever occurred the RBI shares originally destined to go to Dr. Aurandt ultimately would go to the judgment holders, which would result in a greater than 50% transfer of control of RBI. Adams Ex. 28; Tr. 685, 701.

107. In addition to withholding shares from Dr. Aurandt, Mr. Parker also issued 17,674 shares of RBI to an entity called STV Reading, Inc. ("STVR"). Adams Ex. 24; Tr. 809-10, 975. Although Dr. Aurandt was the holder of record of some 90% of STVR voting shares, Mr. Parker did not transmit the RBI shares for STVR to Dr. Aurandt. Rather, Mr. Parker issued the RBI stock destined for STVR to himself. Mr. Parker justified this action based on proxies he had previously received in connection with STVR, which resulted in his election as STVR president. Tr. 970, 977. All of the STVR proxies relied upon by Mr. Parker had come from four persons who had not previously held an ownership interest in RBI. In fact, they were the same four individuals who had secured the judgement and garnishment against Dr. Aurandt discussed above. Adams Ex. 28; Tr. 972, 975-76. RBI shareholders then opposed to Mr. Parker understood that the new RBI shares "were allocated by Mr. Parker in a fashion to skew the voting power of the shareholders of [RBI] in favor of Partel, Inc. and against the former shareholders of [RBI]." Adams Ex. 13, pp. 72-73.

108. Following the issuance of the new RBI stock, Mr. Parker directed Paula Friedman, Esquire, to seek an extension of time from the Commission to allow RBI to consummate the transfer granted by the Commission on August 27, which she did by letter dated and filed October 22, 1991. Tr. 804-06. The reason cited in Ms. Friedman's letter was that RBI needed additional time "to coordinate the transaction, including implementing the bankruptcy reorganization plan approved by the bankruptcy court in Pennsylvania." Adams Ex. 22; Tr. 883-84. In this regard, according to Mr. Parker, more than just the issuance of stock had to occur before RBI could move from the protection of the bankruptcy court, particularly with regard to satisfying Meridian Bank. Tr. 804-06. The staff of the Video Services Division, Mass Media Bureau, granted the extension to December 27, 1991. Adams Ex. 23.

109. On October 25, 1991, Mr. Parker sent to RBI's shareholders notice of a special meeting of shareholders scheduled to occur on October 30. Tr. 806. The notice informed the recipients, *inter alia*, that the meeting's purposes were to remove existing directors, elect new ones, and resolve disputes concerning Dr. Aurandt. Mr. Parker advised the shareholders that they could attend either in person or by proxy. Adams Ex. 25.

110. On October 30, 1991, RBI's shareholders met. The meeting resulted in the election of a new board consisting of Mr. Parker and Dr. Clymer as well as new board members Irvin Cohen, Reverend Frank McCracken and Judge C. Meyer Rose.[31] Adams Ex. 13, p. 70; Tr. 678-79, 806-07. *See also* RBI Ex. 11 (1994 Ownership Report). That board met as such on both October 30, and December 30, 1991. Adams Ex. 15, pp. 77,

[31] RBI Ex. 14 identifies him as Meyer C. Rose.

85; Tr. 682. Mr. Parker knew and understood at that time that Dr. Fischer was no longer going to be a director. Tr. 807.

111. On November 13, 1991, RBI filed a long-form application to transfer control of the licensee of WTVE(TV) (FCC File No. BTCCT-911113KH). Adams Ex. 28; Tr. 693. The application identified the transferor as RBI, debtor-in-possession, and the transferee as RBI. The application reported that: corporate shares outstanding would increase from 50,000 to 419,038 after the transfer; the directors after the transfer would include Dr. Aurandt, Mr. Linton and Dr. Fischer; and listed percentages that each shareholder would have following the transfer. The application advised that the previously approved grant would not be consummated because of questions concerning the ultimate ownership of 13.98% (or more than 58,000) of RBI's proposed shares. *See* ¶ 106, *supra*. Finally, notwithstanding the events of October 15 (the issuance of RBI stock) and October 30 (the shareholders meeting), Mr. Parker denied that a transfer of control had occurred prematurely. Tr. 811. However, he also acknowledged that no stock was issued following the Commission's grant of the long-form transfer application. Tr. 703-04, 813. Mr. Parker signed the application both on behalf of the transferor and the transferee. Adams Ex. 28; Tr. 694, 807-09. Commission approval occurred on February 14, 1992. Adams Ex. 31.

112. According to Mr. Parker, the November 1991 application was prepared by communications counsel (Ms. Friedman) in cooperation with bankruptcy counsel (Mr. Mercer). Mr. Parker denied that he had any role in computing the transferee share percentages that appeared in the application. Tr. 807-08. He also did not recall discussing or thinking about whether RBI needed to report that stock had already been

issued. Tr. 922-23. In his view, the overriding fact was that during the pendency of the November 1991 transfer application, RBI remained as a debtor in possession and would continue as such until secured and administrative creditors were satisfied. Tr. 882-84, 923. For her part, Ms. Friedman confirmed that she prepared the November 1991 application. Tr. 2105. Specifically, she acknowledged that she compiled the information and exhibits and made sure the form was typed and filled in correctly. Although she could not recall with any specifically, Ms. Friedman related that she normally received information from the client. Tr. 2107.

113. On April 16, 1992, RBI filed its 1992 ownership report. Therein, RBI listed its directors as Mr. Parker, Dr. Aurandt, Mr. Linton, Dr. Clymer and Dr. Fischer. RBI also reported that it had not issued 50,812 shares to Dr. Aurandt because of the judgment and garnishment issued against him. Mr. Parker signed the report as RBI's president. RBI Ex. 11 (1992 Ownership Report); Tr. 814.

114. RBI acknowledges that it had failed to list the MSA in a contemporaneous ownership report although it notes that it referenced the MSA in a document filed on February 7, 1992, which transmitted an amendment to the then pending application to transfer control of WTVE(TV). RBI further notes that the MSA was listed in RBI's 1997 through 1999 ownership reports. RBI also acknowledges that its November 1991 application for transfer of control incorrectly listed and incorrectly omitted directors. Finally, RBI acknowledges that its 1992 ownership report (and 1993 certification letter) repeated the same errors relative to directors. RBI Ex. 14. According to Mr. Parker, the errors acknowledged by RBI occurred because of inadvertence on his part. Tr. 812, 814-15.

Comparative Issues (Other than Renewal Expectancy)

Diversification of Control of Media of Mass Communications.

115. RBI holds only one broadcast license, that for WTVE(TV). As of December 28, 1999, the only officer, director or shareholder of RBI, who holds attributable interests in other media of mass communications is Mr. Parker. Mr. Parker is the president, sole director and sole shareholder of TIBS,[32] which is the licensee of international broadcast station KAIJ, Dallas, Texas. Mr. Parker is also the president, sole director and sole shareholder of Desert 31 Television, Inc., licensee of Station KVMD, Twentynine Palms, California. RBI Ex. 4.

116. Other than the current application, Adams holds no interest in any medium of mass communications. Only one of Adams' principals holds an interest in any medium of mass communications. Alvin Robert Umans, an 8.7% shareholder of Adams holds a 4.04% interest in JMP Media, L.L.C. ("JMP"), which is the licensee of Stations WPBG-FM and WMBD, Peoria, Illinois. Mr. Umans has committed unconditionally to the divestiture of his interest in JMP no later than the commencement of operation pursuant to program test authority, by Adams, of its proposed Reading television station. Adams Ex. 1, p. 2.

Comparative Coverage

117. Currently, WTVE(TV)'s grade B contour serves an estimated population of 3,119,889 and covers 14,128 square kilometers. Adams' proposed grade B contour

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[32] TIBS also hold a construction permit for an FM translator station to operate on channel 221 in Upland, California. Finally, TIBS is the proposed assignee of Station WHCT, Hartford, Connecticut. RBI Ex. 4, p. 2. In this regard, however, the Bureau notes that there is pending a proposed settlement, which, if granted, would result in the dismissal of TIBS' application. *See* MM Docket No. 97-128.

would serve 4,260,920 persons and would cover 14, 942 square kilometers. RBI also holds a construction permit, which, if implemented, would result in service to 7,362,938 persons and coverage of 21,602 square kilometers. RBI Ex. 48, p. 3. RBI has held the permit since May 1995.[33] Official Notice Requested. *See also* Adams Ex. 41, p. 5. RBI's right to construct is currently subject to litigation over a zoning matter and has been since 1996. Tr. 863-73; Adams Ex. 41. All areas currently served or proposed to be served by RBI and Adams now receive at least six other authorized television services. *Id.*, p. 5.

III. PROPOSED CONCLUSIONS OF LAW

Adams Issues

118. Notwithstanding the phraseology used in the four issues concerning Adams, the question is whether Adams filed its application for the purpose of achieving a settlement, thereby abusing the Commission's processes, or did it file its application for the purpose of building and operating a television station in Reading. After considering all of the evidence, the Bureau believes that RBI did not demonstrate abusive intent by Adams. Rather, it appears that Adams was guided by the belief that it had a reasonable chance to prevail in a comparative renewal proceeding because WTVE(TV) had been a home shopping station throughout the license term and would have difficulty establishing its right to a renewal expectancy.

[33] The Commission first issued a permit for RBI to modify WTVE(TV)'s facilities in 1990. Official Notice Requested. For various reasons, RBI did not construct the facility authorized in 1990 but sought to move to the site specified in the 1995 permit. Tr. 818-19; Adams Ex. 41.

119. Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or use of that process to subvert the purpose the process was intended to achieve. *See* Broadcast Renewal Applicants, 3 FCC Rcd 5179, 5199 n. 2 (1988). In this regard, the Commission has determined that an abuse of process would include the filing of an application for the primary purpose of achieving a settlement, contrary to Section 311 of the Communications Act of 1934, as amended, 47 U.S.C. § 311. *See* WWOR-TV, Inc., 7 FCC Rcd 636 (1992), *aff'd sub nom.* Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993). Abuse of process is not an easy matter to prove, and the Commission will not infer an improper purpose in filing an application without a specific showing of improper motivation. WWOR, Inc., *supra*, 7 FCC Rcd at 638.

120. In WWOR Inc., key participants in the challenging applicant, Garden State, had received substantial sums for the dismissal of an earlier filed application shortly before filing the application at issue. Thereafter, Garden State also entered into a settlement, which proposed to pay it another $2 million (on top of the more than $5 million its predecessor obtained) for the dismissal of its application and related litigation. Crucial to the Commission's ultimate decision that Garden State had filed its application for the purpose of achieving a settlement was the finding that Garden State could not support its claim that it filed its application because of perceived deficiencies in the renewal applicant's programming. Rather, it appeared to the Commission that the renewal applicant's programming had absolutely no bearing on Garden State's decision to file its application and that its earlier assertions to that effect were lacking in candor. Consequently, the Commission believed that the decision to file was motivated by the

principal investor's desire to gain a large return on his investment. Hence, the Commission concluded that Garden State had filed its application for the purpose of achieving a settlement, contrary to section 311(d) of the Communications Act, and that its filing was an abuse of process warranting Garden State's disqualification. WWOR, Inc., *supra*, 7 FCC Rcd at 640-41.

121. In concluding that Adams did not file for an improper purpose, the Bureau recognizes that there are significant similarities between the circumstances leading up to the filing of Adams' application and those that preceded the filing of Garden State's application. In addition, there are circumstances that appear to indicate that Adams did not have a *bona fide* intent to build and operate a station in Reading. Nevertheless, when all relevant factors are considered the Bureau submits that the evidence does not support a conclusion that Adams abused the Commission's processes.

122. At the outset, virtually all of Adams' principals had been principals of Monroe. As such, they were residents of Chicago, with no noticeable connection either with the Boston market, where the first target was located, or with Reading, the station ultimately challenged. Each had received, at a minimum, hundreds of thousands of dollars following the Monroe settlement. Within two years of the settlement, their leader in the Monroe litigation, Mr. Gilbert, recruited them to join him as investors to file a renewal challenge to a home shopping station in Massachusetts. As investors, they knew little about the station to be challenged and virtually nothing about its market. All they really knew was that their opponent was a home shopping station. Even after Mr. Gilbert turned his attention to WTVE(TV), the other Adams' investors remained ignorant of the particular problems or merit of their opponent, including its efforts to serve Reading and

the surrounding area. Moreover, Mr. Gilbert was almost as ignorant as the others. He did virtually no review or analysis of WTVE(TV)'s public service efforts. He never watched WTVE(TV) before undertaking preparation of Adams' application, and he never authorized anyone on behalf of Adams to review WTVE(TV)'s public file until after the application was filed. Mr. Gilbert was the only Adams' principal ever to travel to Reading to determine whether WTVE(TV) might have served the community's interests, and, even then, he did not establish with any certainty or specificity when and how often he went there. Likewise, although Mr. Gilbert claimed to have interviewed 30 to 40 people in the Reading area about WTVE(TV), he produced no documents showing who he talked to and what they said. Finally, when Mr. Gilbert endeavored to have WTVE(TV) programming taped, he used someone who did not even have access to WTVE(TV)'s programming, and their review of the programming and resultant tapes was so cursory that Mr. Gilbert was not even aware until September 1999 that something other than WTVE(TV) had been taped. Absent countervailing factors, one could view Adams' application as so ill-conceived that Adams could not seriously have filed for the purpose of owning and operating a television station in Reading.

123. However, countervailing factors exist, and they suggest that Adams did not file its application for the purpose of achieving a settlement. First, the Adams' principals were aware that the Commission's rules had changed. Specifically, when the application was filed, they understood that settlement for monetary consideration was not possible until after the issuance of an initial decision. Moreover, even then, the rules only allowed for the recovery of expenses. Second, Adams' principals apparently believed that, notwithstanding the Commission's approbation of home shopping programming, a home

shopping station could have significant problems establishing a renewal expectancy. In this regard, they recognized that the Commission's endorsement of such programming was not unanimous and that it was subject to challenge. They further knew from their Monroe experience that a Commission licensee could operate in a pre-approved manner and yet fail to attain a renewal expectancy and that, without a renewal expectancy, the licensed station was extremely vulnerable. Finally, while Adams provided little proof to support Mr. Gilbert's testimony regarding his efforts to ascertain WTVE(TV)'s public service, it did establish that Reading's only daily newspaper did not even list the station's programming, thereby lending credence to the claim that the community had little or no knowledge of or regard for WTVE(TV). In sum, unlike Garden State, it appears that Adams, at the time it filed its application, understood that a challenge was not likely to result in a for-profit settlement. In addition, Adams had some basis for believing that it could successfully challenge WTVE(TV).

124. Moreover, events subsequent to the filing of Adams' application do not support an inference that Adams filed for the purpose of achieving a settlement. First, Mr. Gilbert flatly rejected the only two direct settlement overtures made to Adams, one of which came directly from Mr. Parker. Second, with respect to Telemundo, although Adams helped to pay for an appraisal of WTVE(TV), arguably for the purpose of determining an appropriate settlement figure, it also appeared to be far more interested in securing Telemundo as a program provider than in having it broker a settlement. In short, the evidence reflects that Adams never actively pursued settlement or seriously considered it as an option. Instead, the evidence indicates that Adams intended to litigate and prevail on the relative merits of its application.

125. Finally, there is no evidence whatsoever indicating that Adams filed its application simply to achieve a precedent regarding home shopping programming. To be sure, Mr. Gilbert believed that a home shopping station was vulnerable to a renewal challenge because the home shopping format made it difficult for a station to address community problems in a meaningful way. However, it is by no means clear, nor does it follow, that he or the other Adams' principals seriously believed that forcing WTVE(TV) to change its format from home shopping would allow them to claim victory. Were this so, one would have expected Adams to consider more readily the concept of settlement once WTVE(TV) abandoned home shopping in favor of Telemundo. Instead, Adams expressed its intention to litigate and thereafter has acted consistently with that expressed intention. In sum, when all relevant factors are considered, it appears that Adams filed its application for the purpose of obtaining the permit, and it should be so concluded.

RBI Issues

A. Misrepresentation/Lack of Candor

126. The instant hearing received extensive testimony and hundreds of pages of documentary evidence in order to determine whether Mr. Parker misrepresented facts or lacked candor in application narratives, which described circumstances related to applications that had been dismissed or denied. After carefully considering all of the facts and circumstances, the Bureau believes that Adams did not prove deceit by RBI. In this regard, the evidence reflects that although Mr. Parker, in his role as an individual applicant and in his role as an officer of TIBS and RBI, certainly could have provided more details relative to the San Bernardino proceeding and the cancellation of the Mt. Baker construction permit, his failure to do so did not occur because of deceit. On the

other hand, when confronted directly with a staff question as to whether any character issues had been requested or added in any proceeding where he had been a party to the application, Mr. Parker, as president of TIBS, responded deceitfully. Because the deceit cannot be attributed directly to RBI, however, the Bureau believes that, after considering all of the factors deemed important by the Commission in assessing a broadcast applicant's character qualifications, disqualification of RBI is not warranted. Rather, the violation should be viewed as an additional, minimal negative factor in denying RBI's renewal expectancy.

127. Misrepresentation involves false statements of fact made with intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983) ("Fox River"). Lack of candor involves concealment, evasion or some other failure to be fully informative, also with intent to deceive. Fox River, *supra*. The duty of candor requires an applicant before the Commission to be "fully forthcoming as to all facts and information relevant" to its application. Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Relevant information is such that may be of "decisional significance." RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982). Intent to deceive can be found when the evidence supports a reasonable inference. California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). Such an inference can arise from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. *See* David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent can also be inferred from motive. *See* Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). Finally, indifference and wanton disregard for accuracy is equivalent to an affirmative and deliberate intent. RKO

General, Inc. v. FCC, *supra*, 670 F.2d at 225. With the foregoing in view, our analysis of Mr. Parker's actions follows.

128. Most of the basic facts are not in dispute. The various decisions issued by the Commission relative to the San Bernardino proceeding reveal that both the ALJ and the Review Board had grave concerns about Mr. Parker. Plainly, they found that Mr. Parker had been an undisclosed real party-in-interest, and at no point did the Review Board or the Commission itself explicitly overturn this finding. Indeed, years later, the Commission itself stated that Mr. Parker's actions had raised substantial and material questions of fact, which precluded grant of an application sought by TIBS. In addition, with respect to Mt. Baker, the Commission cited the applicant for attempted deception in justifying denial of an extension application and cancellation of a construction permit. Undoubtedly, the matters concerning Mr. Parker were serious and clearly implicated his character.

129. Yet, at the same time, it is undisputed that the Commission took no further action with respect to Mr. Parker notwithstanding his ownership of other broadcast interests. In this regard, even though it labeled the SBBLP application "a travesty and a hoax" because it held out Ms. Van Osdel as its principal when the "true kingpin" of the application was Mr. Parker, the Review Board never made a recommendation relative to Mr. Parker despite its knowledge that Mr. Parker held interests "in numerous other broadcast permits." Religious Broadcasting Network, *supra*, 3 FCC Rcd at 4090. Moreover, although a party to the proceeding, the Mass Media Bureau took no action against Mr. Parker. Likewise, although it virtually charged Mt. Baker with attempted deception, the Commission did nothing other than cancel its permit; it, too, took no

further action against any of Mt. Baker's principals. Mt. Baker Broadcasting Co., Inc., *supra*, 3 FCC Rcd at 4778. By not designating any pending application in which Mr. Parker had an interest or initiating a proceeding requiring Mr. Parker (or a related entity) to show cause why that station's license should not be revoked, the Commission apparently determined that the action taken in the particular proceeding was sufficient to address the problem then before it. *See* Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1224-25 (1986) (subsequent history omitted) ("Character Qualifications"). Consequently, the Commission's actions (or, more properly, its inaction) appear to have created a climate of ambiguity, which both Mr. Parker and his attorneys and advisors apparently relied upon in deciding how to answer questions appearing in subsequently filed Commission applications.

130. With the foregoing in mind, the Bureau believes the evidence indicates that Mr. Parker did not intend to deceive the Commission in responding to application questions about his character. First, as to Question 4 of the transfer/assignment applications, the Bureau submits that it focuses on adverse findings or final actions or consent decrees that resulted from *non-FCC* proceedings. In this regard, the Commission has advised that character-related concerns involve both FCC and non-FCC behavior and that the primary focus concerning non-FCC behavior is on adjudicated misconduct. Character Qualification, *supra*, 102 FCC 2d at 1195. Because Question 4 should be interpreted as addressing non-FCC adjudicated misconduct, Mr. Parker's answers, which relate solely to Commission proceedings, should not form the predicate for a misrepresentation or lack of candor.

131. Question 7, on the other hand, plainly focuses on FCC proceedings. In addressing subparts (a) and (b), Mr. Parker properly acknowledged every application to which he had been a party and which had been dismissed or denied. He also correctly responded to subpart (c) in that no licenses had been revoked. More problematical (as discussed further below) was the unqualified answer to subpart (d), which indicated that no character issues were left unresolved, notwithstanding the ultimate resolution of the San Bernardino proceeding. In any event, the question then required only that Mr. Parker name the party, describe the interest, and provide certain specific information, which would allow the staff to review the files and determine whether any further action was required. Had Mr. Parker done only that, he could not have been faulted inasmuch as no decision of the agency has been cited as requiring an applicant to do anything more. *Cf.* Trinity Broadcasting of Florida, Inc. et al. v. FCC, Case No. 99-1183 (D.C. Cir. May 5, 2000) (Applicant cannot be found guilty of misrepresentation with a resultant loss of license when the agency's rule did not clearly give applicant notice of the rule's requirements) ("Trinity"). In this regard, the Bureau is now of the view that Mr. Parker adequately answered Question 7 insofar as Mt. Baker is concerned.

132. However, in his 1991 and 1992 applications, Mr. Parker did more than merely provide the specific information required by the question; he provided a narrative that indicated that further review of the Religious Broadcasting Network case was unnecessary. Specifically, he (and/or his attorneys and advisors) provided his own spin as to *why* the application was denied. In this regard, the Religious Broadcasting Network narrative clearly indicated that the Review Board had determined only that SBBLP suffered comparatively. The narrative gave no hint that a real party-in-interest issue had

been added and resolved adversely to the applicant in the cited Religious Broadcasting Network decision. The narrative also gave no hint as to what Mr. Parker had actually done to warrant the Review Board's decision. By so crafting the narrative, it could be inferred that Mr. Parker sought to discourage staff review of the Religious Broadcasting Network case and avoid any problems that might arise from Commission recognition of his past actions. Finally, the narrative, in conjunction with the unqualified "no" response to subpart's (d) question, falsely indicated that no unresolved character issues existed.

133. Nevertheless, the Bureau believes the evidence does not support a conclusion that disqualifying deceit occurred. First, there is nothing in the record that suggests that the omission of any reference to the Religious Broadcasting Network decision in the March 1989 West Coast application was the result of a conscious decision by Mr. Parker. In this regard, the Religious Broadcasting Network decision did not even merit mentioning inasmuch as the denial of the SBBLP application was not final as of March 1989. Second, with respect to the 1991 and 1992 applications, it appears that the thrust of the Religious Broadcasting Network narrative arose out of a letter Mr. Parker received from his communications attorney, Mr. Wadlow. As discussed, that letter was prepared in haste and contained several glaring factual inaccuracies. Nevertheless, the letter correctly noted that no question had ever been raised as to Mr. Parker's qualifications to serve as a principal of other Commission licensees. Moreover, both Mr. Parker and Mr. Wadlow consistently testified that they believed that approval of the San Bernardino settlement could not have occurred unless the Review Board had resolved the real party-in-interest issue in SBBLP's favor. In light of these circumstances, it is understandable that Mr. Parker believed that the Religious Broadcasting Network

narrative was adequate. In sum, the evidence is insufficient to support a conclusion that Mr. Parker intended to deceive the Commission with respect to the Religious Broadcasting Network narrative.

134. A contrary conclusion, however, is warranted with respect to TIBS' amendment to its then pending application for KCBI, Dallas. The evidence shows that the staff asked for an amendment, which addressed the question whether any character issues had been added or requested with respect to applications that had been dismissed at the request of the applicant. Rather than acknowledge that an issue had been added in the San Bernardino proceeding, Mr. Parker inaccurately "confirmed that no character issues had been added or requested against those applications when those applications were dismissed." At the hearing, Mr. Parker sought to justify his response by claiming variously that the issue had been resolved by the time the SBBLP application was dismissed and that the amendment was not meant to include the SBBLP application because, in his view, he held no interest in that applicant. On the other hand, Mr. Kravetz, Mr. Parker's attorney at the time of the Dallas amendment and the amendment's author, testified unequivocally that, had he known the facts about the San Bernardino proceeding, he would have acknowledged addition of the issue and provided the proceeding's subsequent history. Mr. Wadlow would have done likewise.

135. After considering all the facts and circumstances, as well as Mr. Parker's demeanor, the Bureau submits that Mr. Parker's explanations, which seek to justify TIBS' inaccurate amendment, should be rejected. The Bureau believes that Mr. Parker understood fully that the staff's question required something other than an unqualified denial. Mr. Parker knew that a character issue focusing on him had been added in the

San Bernardino proceeding. Not only had he been he fired as SBBLP's "consultant," he had also been summoned to testify in the proceeding. He also had read both the ALJ and Review Board decisions, which found him to be SBBLP's real party-in-interest. Finally, although SBBLP received consideration for dismissal of its application, the Review Board did not resolve the real party-in-interest issue nor did it vacate the Religious Broadcasting Network decision, which found that Mr. Parker was SBBLP's real party-in-interest. Hence, notwithstanding Mr. Wadlow's letter, which did not address the question whether the issue had been resolved, Mr. Parker had no basis for believing that favorable resolution of the issue had occurred. Mr. Parker's claim at the hearing that he had a contrary understanding is unsupported, self-serving and, in any event, unbelievable. The TIBS' amendment was deceitful and Mr. Parker should be held fully responsible.

136. That being said, the question arises as to what impact Mr. Parker's deceit should have on RBI's qualifications in this proceeding. In Character Qualifications, *supra*, 102 FCC 2d at 1229-32, the Commission considered how to treat character issues in comparative proceedings, including comparative renewal proceedings, and concluded that if consideration of character did not lead to disqualification, it would no longer be a relevant criterion. At the same time, however, the Commission noted that it did not wish to prejudge consideration of compliance with the Act and the rules as it related to an incumbent's past broadcast record in the context of acquiring a renewal expectancy. *Id.*, at 1232 n. 125. Finally, in a subsequent policy statement, the Commission indicated that it found the foregoing strictures too narrow. Thus, while the Commission announced that it intended to continue to be guided by Character Qualifications, it would remain free to

exercise discretion in situations that arise. Amendment of Part 1 – Broadcast Licensing, 5 FCC Rcd 3252 (1990) (subsequent history omitted).

137. The Bureau submits that a proper exercise of discretion in this case requires consideration of Mr. Parker's deceit but not RBI's disqualification. In this regard, the Bureau notes first that the deceit occurred in the context of a TIBS application, not an RBI application. Second, the deceit occurred in 1992. Finally, Mr. Parker, while solely responsible for the deceit, holds a significant, but not a controlling, role in RBI. In this regard, the record reflects that Mr. Parker has served and will continue to serve as RBI's president and as one of its directors. As such, he has signed virtually all documents submitted to the Commission on behalf of RBI, and there is nothing to suggest that he will not continue to do so. Thus, although Mr. Parker's deceit does not directly impact upon RBI's record, his ability and willingness to tell the truth must be considered in making predictive judgments about RBI. Considering all of the foregoing, the Bureau believes that the most logical and just result is consideration of the violation in the context of RBI's renewal expectancy. The Bureau submits that the violation is further evidence, however slight, that RBI's renewal period performance was minimal (as explained more fully, *infra*) and that, therefore, no renewal expectancy is warranted. By viewing the violation in such a manner, the Bureau believes that Mr. Parker's role at RBI will be considered while, at the same time, RBI will not be unduly penalized for an action that it did not commit. In this regard, however, the Bureau wishes to make clear its view that RBI is not entitled to a renewal expectancy regardless of how much weight is attributed to TIBS' deceit.

B. Renewal Expectancy

138. In a comparative renewal proceeding, a renewal expectancy is a comparative preference that can be awarded to the renewal applicant based on its most recent license term performance. *E.g.*, Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990). The weight given the renewal expectancy varies according to the merit of the licensee's performance. If that performance is deemed "superior" or "exceptional," a strong comparative preference results. Radio Station WABZ, Inc., 90 FCC 2d 818, 839-40 (1982), *aff'd sub nom.* Victor Broadcasting, Inc. v. FCC, 722 F.2d 756 (D.C. Cir. 1983). A "substantial" record that is "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal" also merits a preference, though a lesser one. *Id.* However, if the licensee's performance is deemed "minimal," no preference is awarded. *E.g.*, Harriscope of Chicago, Inc., 5 FCC Rcd 6383, 6385 (1990), *recon. denied*, 6 FCC Rcd 4948 (1991) ("Video 44"). In short, the strength of the expectancy depends on the merit of the licensee's past record. *E.g.*, Cowles Broadcasting, Inc., 86 FCC 2d 993, 1007-08, 1012 (1981), *aff'd sub nom.* Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983) ("Cowles"). If awarded, the renewal expectancy is the most important comparative factor in determining which applicant should prevail in a comparative renewal proceeding. Implementation of Section 309(j) of the Communications Act – Competitve Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 16005 (1998) (subsequent history omitted).

139. A "substantial" performance can be demonstrated by any type of showing reasonably related to demonstrating service over and above what would be considered

minimal. Broadcast Communications, Inc., 93 FCC 2d 1162, 1166 (1983), *modified* 97 FCC 2d 61 (1984), *aff'd sub nom.* Genesis Broadcasting, Inc. v. FCC, 759 F.2d 959 (D.C. Cir. 1985). In evaluating an incumbent licensee's performance, the Commission has considered the following:

> (1) The licensee's efforts to ascertain the needs, problems and interests of its community;
>
> (2) The licensee's programmatic response to those ascertained needs;
>
> (3) The licensee's reputation in the community for serving the needs, problems and interests;
>
> (4) The presence of absence of any special effort at community outreach or towards providing a forum for local self-expression; and
>
> (5) The licensee's record of compliance with the Communications Act and FCC rules and policies.

Fox Television Stations, Inc., 8 FCC Rcd 2361, 2366-69 (Rev. Bd.), *recon. denied*, 8 FCC Rcd 3583 (Rev. Bd.), *review denied*, 9 FCC Rcd 62 (1993) (subsequent history omitted).

140. After evaluating RBI's performance in light of recent case law, the Bureau believes that RBI's performance cannot be characterized as substantial, superior or exceptional. Rather, after considering all the evidence, the Bureau believes that RBI's performance was minimal. *See, especially*, Video 44, *supra*. Hence, no renewal expectancy is warranted.

141. Community Ascertainment. The findings indicate that, for the first half of the renewal period, RBI did not consistently engage in a continuing process of ascertaining the needs, problems and interests of its community. In this regard, RBI apparently relied on sales personnel as its primary means of conducting ascertainment.